

REMARKS

In response to the Office Action mailed September 14, 2005, Applicant amends claim 1.

Claims 1 and 5-21 are presented for examination.

Claim rejections under §103(a)

The examiner has rejected claim 1 under 35 U.S.C. §103(a) as being unpatentable over *Partridge* (US 6,160,811) in view of one or more of *Kudo* (US 5,278,830) and *Locklear* (US 6,252,878).

Claim 1 recites a distribution processor for distributing header data, which has been separated from the useful data, among the data processing processors. The distribution processor distributes the header data at least in part on the basis of a priority specified by the header data and the workload of the data processing processors.

In response to the Applicant's remarks submitted on August 22, 2005, the examiner states:

The Examiner did not rely on *Kudo* in answering the limitation, separating the packets into header data and useful data. The rejection clearly specifies that this limitation is taught by the *Partridge* reference. *Kudo* is referred mainly to get the teaching on distributing data according to the priority of the header data. *Locklear* is referred mainly to get the teaching on distributing data according to loading characteristics of the selected route processors.

Based on these comments of the examiner, the Examiner still appears to rely on *Kudo* and *Locklear* for teaching a distribution processor that “distributes the header data which has been separated from the useful data at least in part on the basis of a priority specified by the header data and the workload of the data processing processors.”

As described previously in the remarks filed on August 22, 2005, *Kudo* distributes *complete packets* (header and payload) to a buffer designated by the priority data.¹ Therefore, what *Kudo* discloses is the distribution of header data that is *conjoined with* useful data. This is the antithesis of claim 1's recitation of a distribution processor that "distributes the header data, which has been separated from the useful data, at least in part on the basis of a priority specified by the header data" as recited in claim 1.

As also described previously in the remarks filed on August 22, 2005, *Locklear* carries out an initialization sequence which assigns routing assignments that are to be used in future communications.² Since the assignment is determined during initialization, it cannot possibly be based on header data. After all, header data, or any data for that matter will not yet have been received. Therefore, *Locklear* fails to disclose or suggest a distribution processor that "distributes the header data...on the basis of... the workload of the data processing processors."

Partridge discloses a system in which a to-switch unit (TSU) stores a table of information used to identify various types of packets that may arrive at the TSU.³ For each type of packet expected, the TSU identifies "a particular one of the forwarding engines which should make the next hop routing decisions for that particular type of packet."⁴ Because *Partridge* teaches selecting the forwarding processor based on the type of packet received, *Partridge* fails to disclose or suggest a distribution processor for distributing the header data... at least in part on

¹ Col. 2, lines 32-41, col. 2, lines 60-69.

² Col. 5, lines 5-13.

³ Col. 4, lines 56-64.

⁴ Col. 4, lines 61-64.

the basis of a *priority* specified by the header data and a *workload* of the data-processing processors” as recited in claim 1.

None of *Partridge*, *Kudos* and *Locklear* disclose or suggest a distribution processor that “distributes the header data, which has been separated from the useful data, at least in part on the basis of a priority specified by the separated header data and the workload of the data processing processors” as recited in claim 1. Therefore, even if *Partridge*'s system were modified based on the teachings of *Kudos* and *Locklear* as proposed by the examiner, the result would still fail to meet the limitations of claim 1.

The dependent claims 5-20 are allowable for at least the reasons set forth above for claim 1.

Claim rejections under §103(a) fail to provide a motivation to combine

It is difficult to imagine why one of ordinary skill in the art would combine the teachings of *Locklear* and *Kudo* with those of *Partridge*. As described above, *Partridge* teaches selecting the forwarding processor based on the type of packet received. Since *Partridge* selects a forwarding processor capable of handling the *type* of packet, it is unclear why one would all of a sudden select the forwarding processor based on the priority of the packet and the workload of the forwarding processors, neither of which bears any relation to the type of data packet. In fact, the proposed modification all but guarantees routing a packet to a forwarding processor incapable of handling that particular type of packet (e.g., a processor designed to handle a different type of packet). If the examiner is to maintain this rejection, the Applicant requests that the Examiner show where the prior art provides a motivation to combine the references.

The absence of any plausible motivation to combine the references suggests an inadvertent hindsight reconstruction, using applicant's claim as a template to reconstruct the invention by picking and choosing isolated disclosures from the prior art. This is impermissible under the law. For example, in *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992), the Federal Circuit stated:

It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. *In re Gorman*, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991). This court has previously stated that "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." (Quoting *In re Fine*, 837 F.2d at 1075, 5 USPQ2d at 1600)

The present rejection fits the court's description of what may not be done under § 103. The examiner has merely listed certain components of applicant's invention and then located isolated disclosures of those components. The law requires more than that. The examiner must show where the prior art provides a motivation to combine the references. Absent a motivation to combine, obviousness has not been demonstrated.

Rejection of claims 15 and 18-21

The examiner has rejected claims 15 and 18-21 under 35 U.S.C. §103(a). In the rejection, the examiner states that the cited references fail to disclose the limitations of these claims and relies simply on "official notice." MPEP 2104.04 states:

If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained. See 37 CFR 1.104(c)(2). See also *Zurko*, 258 F.3d at 1386, 59 USPQ2d at 1697 ("[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test). If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. See 37 CFR 1.104(d)(2).

The applicant, therefore, traverses the examiner's assertion of "official notice" and requests that the examiner provide documentary evidence to support the rejection of claims 15 and 18-21 if these rejections are maintained.

Summary

It is believed that all of the rejections have been addressed. However, the absence of a reply to a specific rejection, issue or comment does not signify agreement with or concession of that rejection, issue or comment. In addition, because the arguments made above may not be exhaustive, there may be reasons for patentability of any or all pending claims (or other claims) that have not been expressed. Finally, nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper, and the amendment of any claim does not necessarily signify concession of unpatentability of the claim prior to its amendment.

Please apply any other charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: 12/9/05

Tonya S. Drake
Tonya S. Drake
Reg. No. 57,861

Fish & Richardson P.C.
225 Franklin Street
Boston, MA 02110
Telephone: (617) 542-5070
Facsimile: (617) 542-8906